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SUPREME COURT OF THE UNITED STATES

[redacted],

Petitioner,

THE STATE OF FLORIDA,

Petitioner,

[redacted] TRODY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE POLICE ARE PROHIBITED FROM INITIATING INTERROGATION ON UNCHARGED OFFENSES WHERE THE ACCUSED HAS REMAINED IN CONTINUOUS CUSTODY AFTER REQUESTING AT A JUDICIAL PROCEEDING THAT HIS ATTORNEY BE PRESENT AT ANY QUESTIONING

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III. STATEMENT OF THE CASE

On May 25, 1988, Joseph Trody was arrested and charged with two counts of burglary and two counts of grand theft after pawning items taken during two separate burglaries. At the time of his arrest, Trody indicated to the detectives that he was willing to talk to them about other burglaries he had committed. The detectives did not avail themselves of Defendant's offer to talk. (Pet. App. 3).

On May 26, 1988, Trody was appointed counsel and signed an invocation of his right to counsel. In that document, Trody stated that he "desire[d] to have [his] attorney, the Public Defender, present before and during any questioning of, interviewing of, and/or conversations with me by any police official . . . . about any matters relating to this case or any criminal charge pending or contemplated." (Pet. App. 11). Later that day, he was charged with two more burglaries. These new charges resulted from a comparison of Trody's fingerprints to those found at the scene of other burglaries. (Pet. App. 3).

The next day, on May 27, Trody appeared before the Court for a bond hearing on the new charges. He was again appointed counsel and again invoked his right to counsel. (Pet. App. 3).

On May 31, 1988, the detectives initiated contact with Trody, who had remained in jail, and charged him with two additional

charges of burglary and grand theft. At that time, Trody signed a waiver of his constitutional rights and told detectives that he had committed other burglaries. The detectives, however, again chose not to talk to Trody. (Pet. App. 3).

On June 1, 1988, Trody appeared before the Court on the prior day's charges. He again invoked in writing his right to an attorney. (Pet. App. 3).

On June 2, 1988, despite Trody's three written invocations of his right to counsel and his being represented by counsel, the detectives again initiated contact with Trody in jail. (Pet. App. 3). Trody signed a waiver of his constitutional rights and the detectives interrogated him. Trody told them about other burglaries he had committed. The detectives then drove Trody around the city so that he could point out the locations of these other burglaries. (Pet. App. 3).

While in jail, Trody neither telephoned the detectives nor in any way contacted them. Rather, the detectives initiated each contact with Trody while he was being held in jail. It was not necessary for the detectives to have contact with Trody in order to charge him with the additional cases. The arrest forms could have routinely been left at the jail without the detectives' having had direct contact with Trody. (Pet. App. 5).

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As a result of the information he gave to the detectives, Trody was charged with, and convicted of, nineteen additional counts of burglary and twenty additional counts of grand theft. (Pet. App. 4). Trody appealed those thirty-nine convictions and sentences after his motion to suppress the evidence regarding them was denied. (Pet. App. 2).

On March 6, 1990, the District Court of Appeal for the Third District of Florida reversed Trody's convictions and sentences upon a holding that the police had improperly initiated interrogation after Trody's assertion of his right to counsel. (Pet. App. 2-5). Accordingly, the waivers procured by the police of Trody's constitutional rights for those police-initiated interrogations were invalid. In so holding, the Third District Court of Appeal applied the bright-line rule that was enunciated in Edwards v. Arizona, 451 U.S. 476, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and extended to interrogations about unrelated charges in Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). (Pet. App. 4-5).

The State then unsuccessfully petitioned the Florida Supreme Court for review. The Court's denial of the petition was entered on December 7, 1990. (Pet. App. 1). The State's petition to the United States Supreme Court followed.

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IV. SUMMARY OF ARGUMENT

This Court should deny the State of Florida's Petition for a Writ of Certiorari to the Florida Supreme Court. Unlike State v. McNeil, 454 N.W.2d 742 (Wisc. 1990), cert. granted, McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990), the District Court of Appeal of Florida correctly held that the defendant's invocation of his right to counsel prohibited the police from thereafter initiating interrogation about unrelated offenses. In so holding, the District Court of Appeal properly applied the bright-line rules laid down by this Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); and Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Accordingly, there is no need for this Court to exercise its discretionary jurisdiction to review the decision below.

V. ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISION BELOW IS CORRECT.

This Court should decline to exercise its discretionary jurisdiction to review the decision below, in which the District Court of Appeal of Florida correctly held that because the Defendant, Joseph Trody, had invoked his right to counsel, the waivers of that right which the police secured during police-initiated interrogation on unrelated charges were invalid. In so

holding, the District Court of Appeal correctly applied this Court's bright-line rule enunciated first in Edwards v. Arizona, 451 U.S. 477, and later extended in Michigan v. Jackson, 475 U.S. 625, and Arizona v. Roberson, 486 U.S. 675.

In Edwards v. Arizona, this Court held that

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, ____ (1981) (emphasis added; footnote omitted).

Then, in Michigan v. Jackson, the Court extended the rule to the invocation of counsel at arraignment:

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Michigan v. Jackson, 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631, ____ (1986).

Finally, in Arizona v. Roberson, the Court extended the Edwards rule to prohibit police-initiated interrogation on unrelated

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charges after a suspect requests counsel. The Court explained its rationale:

> As a matter of law, the presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.

Arizona v. Roberson, 486 U.S. at ___, 108 S.Ct. at 2099, 100 L.Ed.2d at ___.

Here, the Defendant invoked his right to counsel on three separate occasions[1/], each time he was arraigned on new charges. Twice, the police initiated contact with the Defendant while in jail and while represented by counsel, and on the second instance, obtained from the Defendant the evidence used to charge him with and convict him of an additional 19 counts of burglary and 20 counts of grand theft. The police simply crossed the bright-line rule of Roberson and Edwards. Accordingly, the District Court of Appeal correctly ruled that the evidence thus obtained should have been suppressed and reversed the judgments of conviction and sentences based thereon.

The State of Florida argues that this Court should review the District Court of Appeal's decision because certiorari has already

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1/ Counsel was invoked pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 12, and 16 of the Florida Constitution. (Pet. App. 11). Article I, § 9, specifically concerns the right against self-incrimination. (Pet. at 3).

been granted in State v. McNeil, 454 N.W.2d 742 (Wisc. 1990), cert. granted, McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 340, 112 L.Ed. 305 (1990). However, this Court need not grant certiorari in this case because, unlike State v. McNeil, the decision below is correct. See Rule 10.1(b), Rules of the Supreme Court.

First, the Defendant did, in fact, invoke his right against self-incrimination and, as a result, his Fifth Amendment rights attached as of May 26, 1988 -- well before the questioning at issue.

Second, when an accused requests at an arraignment or similar judicial proceeding that an attorney be present at any police questioning, the police are prohibited from initiating interrogation on unrelated offenses. Edwards; Roberson. The Wisconsin Supreme Court in State v. McNeil erroneously concluded the opposite -- that a request for counsel at an arraignment invokes only the Sixth Amendment right to counsel, not that of the Fifth Amendment, and thus does not preclude police-initiated interrogation on unrelated offenses. State v. McNeil, 454 N.W. 2d at 743-745. The court in McNeil improperly limited the scope of Edwards' application depending upon which constitutional amendment was expressly invoked by the accused as the basis for his request for counsel. State v. McNeil, 454 N.W. 2d at 746.

Whether the defendant's exercise of his right to counsel is based on the Fifth Amendment or the Sixth Amendment should not make

a difference in the scope of the application of that right. Michigan v. Jackson, 478 U.S. at 631, 106 S.Ct. at 1408 (rejecting argument that differences in legal principles underlying Fifth Amendment preclude application of Edwards rule to Sixth Amendment claim). This Court has repeatedly recognized that there exists a danger of "subtle compulsion" when a defendant who requests the assistance of an attorney is nevertheless subjected to further interrogation initiated by the police while remaining in custody. Edwards, 451 U.S. 477; Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Roberson, 486 U.S. 675; Michigan v. Jackson, 475 U.S. 625.

That danger is present regardless of the particular constitutional provision the defendant cites as the basis for his invocation of the right to counsel. As this Court stated so clearly in Michigan v. Jackson:

> Edwards is grounded in the understanding that 'the assertion of the right to counsel [is] a significant event," and that 'additional safeguards are necessary when the accused asks for counsel.' We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request is made at an arraignment and when the basis for the claim is the Sixth Amendment.
>
> 476 U.S. at 636, 106 S.Ct. at 1411 (quoting Edwards, 451 U.S. at 485, 484, 101 S.Ct. at 1885, 1884).

In contrast to the State's argument in its Petition, the reasoning of Edwards applies with even greater force to requests for counsel based on the Sixth Amendment, and there is no reason that the police should be permitted to initiate interrogation on unrelated

offenses after an accused has asserted the right to counsel at an arraignment or similar proceeding. Michigan v. Jackson, 475 U.S. at 636, 106 S.Ct. at 1411.

As this Court stated in Roberson, 108 S.Ct. at 2099:

> As a matter of law, the presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation. . . . This discomfort is precisely the state of mind that Edwards presumes to persist until the suspect himself initiates further conversation about the investigation; unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific.

Here, the police repeatedly initiated interrogation even though Trody repeatedly requested that counsel be present at any questioning. And, Roberson having settled the debate about whether a request for counsel precludes police-initiated interrogation on unrelated charges,[2/] the District Court of Appeal correctly held

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[2/] There can be no doubt that this is what Roberson held. See Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988) (Edwards distinguished on the basis that interrogation related to unrelated crime), on reconsideration, 864 F.2d 24, 25 (1989) (Butler's conclusion "cast into immediate and serious doubt" by Roberson), aff'd sub nom. Butler v. McKellar, ___ U.S. ___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (new rule announced in Roberson not applicable to collateral review); see Illinois v. Perkins, ___ U.S. ___, ___, 110 S.Ct. 2394, 2399, ___ L.Ed.2d ___, ___ (1990) ("if respondent [who was in custody when questioned] had been formally charged on the unrelated charged and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements") (Brennan, J., concurring).

that the waiver of the Defendant's constitutional rights obtained by the police was ineffective and the evidence obtained in the improper interrogation should have been suppressed.

Finally, the State of Florida contends that the decision below should be reviewed because it directly conflicts with Illinois v. Perkins, ___ U.S. ___, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), which the State characterizes as having "disapprove[d] of the commingling of the Fifth and Sixth Amendment rights to counsel." Petition for Writ of Certiorari, at 8. Once again, the State has mischaracterized a case in an effort to demonstrate conflict. Illinois v. Perkins concerned only the question of whether Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), applied to the questioning of an incarcerated suspect by an undercover agent. There was no request for counsel, either prior to or during the questioning. Thus, Illinois v. Perkins does not apply to the decision below, and there is no conflict.

VI. CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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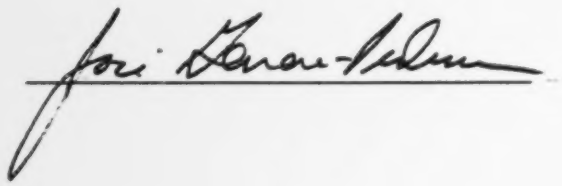
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the Respondent's Brief was mailed to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301; Michael J. Neimand, Esq., Assistant Attorney General, and Monique T. Befeler, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 N.W. Second Avenue, Miami, Florida 33128, the 5th day of April, 1991.



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